NO. 20235

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RAMONA CIPRES, JUAN MONTES DeOCA,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

FILED

DEC 1 1965

FRANK H. SCHMID, CLERK

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I

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION.

On October 16, 1963, the Federal Grand Jury for the Southern District of California, Central Division, returned a two-count Indictment charging appellants as follows:

Count One: Both appellants Ramona Cipres and Juan Montes DeOca together with Manuel Angel Gonzalez were charged with the September 17, 1963 receipt, concealment and facilitation of the transportation of 48, 229 grams of marihuana within the Central Division of the Southern District of California, in violation of Title 21, United States Code, Section 176(a).

Count Two: Appellant DeOca and Gonzalez were charged

with the September 18, 1963 receipt, concealment and facilitation of transportation of 70,726 grams of marihuana within the Central Division of the Southern District of California, in violation of Title 21, United States Code, Section 176(a) [C. T. 2, 3]. 1/

On October 28, 1963, the appellants were arraigned on the Indictment and pleaded not guilty as charged [C. T. 5].

Manuel Angel Gonzalez, also charged in the Indictment in both counts, entered a plea of guilty to Count One of the Indictment on December 10, 1963, prior to the commencement of trial [C. T. 25-27]. He did not go to trial.

On December 10, 1963, jury trial was commenced before United States District Judge Harry C. Westover [R. T. 4]2/; and on December 13, 1963, the jury returned verdicts of guilty as to appellant DeOca on Counts One and Two, and as to appellant Cipres on Count One [C. T. 21].

On January 7, 1964, appellant DeOca was sentenced to five years imprisonment on Counts One and Two, to run concurrently, and appellant Cipres was sentenced to five years imprisonment on Count One [C. T. 43, 1a].

Timely notices of appeal were filed by appellant Cipres on January 7, 1964 [C. T. 2a], and by appellant DeOca on January 10, 1964 [C.T. 44].

1/ C. T. refers to Clerk's Transcript of Trial Proceedings.

2/ R. T. refers to Reporter's Transcript of Trial Proceedings.

On March 18, 1965, this Court filed its Opinion in case No. 19217, 343 F. 2d 95 (9th Cir. 1965), remanding the case to the District Court for further proceedings, which Opinion is attached hereto and marked Appendix "A".

Thereafter, on May 18, 1965, further proceedings were held before United States District Judge Harry Westover [R. T., May 18, 1965 Hearing, pp. 1-103]. Special Findings of Fact and Conclusions of Law were filed on June 8, 1965, sustaining the judgment of conviction, and are set out in toto within this brief.

Thereafter timely notice of appeal was filed by DeOca on June 17, 1965, and by appellant Cipres on June 18, 1965.

The United States District Court for the Southern District of California had jurisdiction of this case based on Title 21, United States Code, Section 176(a), and Title 18, United States Code, Section 3231. The jurisdiction of this Court is based on Title 28, United States Code, Sections 1291 and 1294.

II

STATUTES INVOLVED

Title 21, United States Code, Section 176(a), provides in pertinent part as follows:

> "Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, . . . receives, conceals, buys, sells, or in any manner facilitates the transportation,

concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. . . .

"Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

Title 19, United States Code, Section 482, reads as follows:

"Any of the officers or persons authorized to board or search vessels may stop, search, and examine as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, in which he may have a reasonable

cause to suspect there is merchandise which was imported contrary to law; and if any such officer or other person so authorized shall find any merchandise on or about any such vehicle, beast, or person, or in any such trunk or envelope, which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, whether by the person in possession or charge, or by, in, or upon such vehicle, beast or otherwise, he shall seize and secure the same for trial."

III

STATEMENT OF THE CASE

A. Questions Presented.

The following questions have been presented by appellants on these appeals and are here paraphrased:

1) Was the search of appellant Cipres' bags at the airport valid as incident to a substantially contemporaneous lawful arrest, based on reasonably trustworthy information of facts sufficient to warrant a prudent man in believing that appellant Cipres was committing an offense, that removal

of the evidence was threatened, and that an immediate search was necessary to preserve the material subject to seizure?

2) Was the marihuana (Exhibit No. 5) found in the garage of Manuel Gonzalez, and the subject of Count Two, a product of an illegal search and seizure, i.e. the fruit of the poisoned tree?

3) Did the District Court err in refusing to force the Government to disclose the identity of a confidential reliable informant, who had related to an agent that one Jorge Rodriguez was to receive marihuana in Los Angeles in September of 1963 which was to be brought across the border by Miguel Garcia and Cerena Truba.

B. Statement of Facts

1. Evidence at Jury Trial

The following facts were adduced at appellants' jury trial:

In August of 1962, Manuel Angel Gonzalez, a Cuban citizen living in Los Angeles, met Oscar DeOca. Two months later Gonzalez met Oscar's brother, appellant Juan Montes DeOca. Gonzalez later got appellant DeOca a job [R.T. 20, 21, 22].

Approximately three weeks prior to September 17, 1963, Gonzalez met with appellant DeOca. DeOca explained that he and

his wife were getting separated and requested permission of Gonzalez to leave some luggage in the garage for the period of approximately four days [R. T. 23, 27]. Gonzalez acquiesced and thereafter four suitcases were left by appellant DeOca and his brother in the Gonzalez garage [R. T. 27].

On September 8, 1963, appellant DeOca returned to Gonzalez' home and in a conversation concerning the suitcases, admitted to Gonzalez, "Yes, its marihuana. I am in that business." [R. T. 41].

On September 11, 1963, Gonzalez gave appellant's brother (Oscar DeOca) duplicate keys to his car, a 1959 pink 4-door Pontiac Catalina, keeping one set of keys for himself [R. T. 133, 36].

On the evening of September 11, 1963, Gonzalez placed two pieces of luggage in the trunk of his car and drove to the airport. After parking, he proceeded to an airport cafeteria. When he later returned to the parking lot, he saw appellant DeOca crossing the street [R. T. 62, 63]. When Gonzalez opened the trunk of the car, six days later, the luggage was gone [R. T. 66].

On September 17, 1963, appellant DeOca and his brother Oscar brought a cardboard carton [Ex. 5] to the Gonzalez garage [R. T. 72]. Later in the day, appellant's brother returned to the garage with two empty blue bags [Exs. 1 and 2], and filled the bags from the marihuana contained in the cardboard carton [R. T. 65, 117, 118]. The bags were then placed in the trunk of Gonzalez' car by appellant DeOca's brother, and the trunk was locked [R. T. 70]. Subsequently, Gonzalez was asked by Oscar DeOca to take the

suitcases to the airport [R. T. 118].

At approximately 8:15 p. m., September 17th [R. T. 131], and before he could drive his car to the airport, Gonzalez drove to his mother's house where he was met by appellant DeOca, who was waiting for him [R. T. 123]. Appellant DeOca then took Gonzalez' car and stated he would return the car in an hour and half or two hours [R. T. 125]. Appellant DeOca drove off, despite the fact that Gonzalez noted that he had retained his own set of keys in his pocket [R. T. 124]. At approximately 10:45 p. m., that same night, Gonzalez found the car in a lot adjacent to his mother's home [R. T. 131].

Meanwhile, at 9:00 p. m. on September 17, 1963, Customs Agent Neil Greppin and Sergeant D. W. Beckman of the Los Angeles Police Department, had stationed themselves near the American Airlines ticket counter at Los Angeles International Airport, as a result of information received to the effect that a man utilizing the name of Julian Martinez, a Cuban marihuana trafficker [R. T. 153], had checked in at the Blair House Hotel in Hollywood and was suspected of involvement in the trafficking of narcotics from New York to Los Angeles, and Los Angeles to New York [R. T. 153, 196]. A check had been made with the airlines and it was discovered that American Airlines had a reservation on a flight leaving at 10:00 p. m., on September 17th, under the name of Martinez [R. T. 153].

At approximately 9:50 p. m., at the previously described location, Greppin saw appellants DeOca and Cipres get out of a

1959 salmon colored Pontiac, California license LMC 357 [R. T. 135, 138], a car registered to Manuel Gonzalez [R. T. 179a]. The officers watched as appellant DeOca removed two suitcases from the car [Exs. 1 and 2], and handed them to a porter stationed at curbside [R. T. 137-139]. Appellant DeOca was recognized immediately by Agent Greppin as the subject of previous surveillances relative to narcotics trafficking [C. T. 37]. Sergeant Beckman testified that prior to the officer's arrival at the airport, "a previously reliable informant of the Los Angeles Police Department had informed the Department that Juan Montes DeOca was 'running' marihuana for his brother, Oscar DeOca" [C. T. 40]. DeOca was then observed to get back into the Pontiac and drive away from the terminal [R. T. 140].

Appellant Cipres was observed to follow the porter with the suitcases to the American Airlines counter. As Cipres called for a reservation under the name of Martinez [C. T. 38; R. T. 140], Beckman and Greppin observed that the bags, when placed on the weighing machine at the ticket counter by the porter, weighed approximately 140 pounds [R. T. 140, 162].

Both Greppin and Beckman, in affidavits filed with the court, stated that based upon prior investigations in marihuana traffic between Los Angeles and New York, they knew the modus operandi of the traffickers was as follows:

> "Young Latin female couriers checked overweight baggage containing marihuana into the counters at American and Trans World Airlines immediately

prior to flight time. Additionally the flights were invariably nonstop flights from Los Angeles to New York City." [C. T. 38, 41].

The officers then approached appellant Cipres, identified themselves as police officers and stated that they were conducting a narcotic investigation concerning her [R. T. 142, 165]. When asked for identification, appellant Cipres admitted that her real name was Ramona Cipres, but indicated that she sometimes used the name Martinez when travelling [R. T. 144].

Beckman then asked her if she would step away from the counter "where I could talk to her further concerning the suitcases which I believe to contain marihuana. She came along with me willingly." [R. T. 165].

Beckman picked one of the heaviest suitcases off the scales and walked away from the counter with appellant Cipres while Greppin pulled the second bag off the airline conveyor belt, left it at the counter, and joined the others [R. T. 144].

Appellant Cipres during this initial conversation, indicated that she had stayed at Monte Villa, and had just come from a friend's home in a cab in order to catch a plane for New York [R. T. 166].

When first asked about the contents of her suitcase, she claimed she had clothes in them, but when queried as to how clothing could give so much weight to the suitcases, admitted, "Well, I don't only have clothes in there, but I have cosmetics in

there as well" [R. T. 166].

Asked if they could search her suitcases, appellant Cipres responded, "Yes, I have nothing to hide" [R. T. 166]. When asked for the keys she added, "The bags are locked and the keys are in New York " [R. T. 145].

At this point Greppin returned to the second bag, picked it up, and by pushing the sides in and placing his nose to the seam of the suitcase, he smelled an odor familiar which was to him, that of marihuana. He thereupon opened the suitcases, which were found to be already unlocked and discovered the marihuana contained therein [R. T. 147, 162, 184].

Agent Greppin walked over to Beckman and appellant Cipres and advised appellant Cipres she was under arrest. The other bag [Ex. 2] was subsequently opened at the airport and found to contain marihuana [R. T. 186]. Neither bag was found to be locked [R. T. 162].

After the trial had commenced and during the course of Agent Greppin's testimony, appellants challenged the admissibility of the suitcases containing the marihuana [Exs. 1 and 2] on the grounds that they constituted the fruits of an unreasonable search [R. T. 149]. The trial court then took evidence outside the presence of the jury relating to the search which occurred at the airport where appellant Cipres was arrested.

The court found that the search in question was made with the voluntary consent of appellant Cipres [R. T. 172] and denied the motion [R. T. 176].

The jury trial resumed and the suitcase [Ex. 1] was admitted into evidence [R. T. 185].

Later in the trial the motion for suppression was renewed [R. T. 392] by appellant Cipres and the court again denied the motion, stating:

> "I think counsel, that whether or not consent was given was a question of fact. I have ruled against you. I have said if permission was given, and permission was given, why that rules out the question of illegal search and seizure." [R. T. 532].

Because of the Court's decision that consent had been given to the search, no ruling was made by the District Court as to whether or not the officers had probable cause to seize and search the bags and/or arrest appellant Cipres.

2. Decision of the Court of Appeals

The March 18, 1965 decision of the Court of Appeals, reported as Ramona Cipres and Juan Montes DeOca v. United States of America, 343 F.2d 95 (9th Cir. 1965), remanded the case "for further proceedings in accordance with this opinion". (The entire opinion is set out herein and attached hereto as Appendix "A".)

Of pertinence is the following language found at pages 98 and 99 in that opinion:

"Giving full credit to the officers' testimony that Cipres orally consented to the search, a substantial question still remained as to whether she waived her constitutional privilege. A number of circumstances suggest that her arrest may have reflected less than a free, deliberate, and unequivocal decision to permit the officers to open the luggage: it was obtained "under color of the badge" and therefore presumptively coerced; it was coupled with the statement that the bags were locked and the keys unavailable, which on its face would have rendered the consent ineffectual; it was accompanied by assertions that Cipres was innocent and that the suitcases contained innocuous articles and not marihuana, assertions certain to be exposed as false the moment the bags were opened; and admittedly Cipres asked if the officers had a search warrant.

"Because of the overly narrow view which the district court apparently took of the question presented, it did not explore and determine the issue of waiver in the light of these and other circumstances surrounding the arrest. We remand the case so that this may be done, either on the present record or after such further hearing as the court may deem appropriate.

"As we have noted, Cipres was arrested

immediately following the discovery of the marihuana. The government urges that the arrest was valid, and that the search should be upheld as incident to it. We have held that a prior search may be valid as incident to a substantially contemporaneous arrest without a warrant if the arresting officers had probable cause for the arrest at the time of the search, and the circumstances suggested that immediate search was necessary to preserve material subject to seizure. Thus the inquiry would be whether at the moment the bags were searched the officers had reasonably trustworthy information of facts sufficient to warrant a prudent man in believing that Cipres was committing an offense, and that removal of the evidence was threatened. But these also are questions of fact to be decided initially by the district court. That court has not yet done so; having found that Cipres 'consented' to the search, the district court thought it unnecessary to determine whether the search might have been valid upon any other ground. Unresolved factual issues were likewise raised by the government's contention that the search was justified by 19 U.S.C.A. §482. To avoid a further multiplication of hearings and appeals, these issues should be resolved by the district court on remand."

3. The Hearing and Findings of the District Court on Remand.

On May 18, 1965, the United States District Court heard the matter on remand and took additional testimony, and on June 8, 1965 entered Special Findings of Fact and Conclusions of Law. In the hearing before the District Court, appellee did not present any additional evidence as to whether appellant Cipres had been warned of her constitutional immunity from unreasonable search and seizure. Appellee agreed with the District Court that, in light of all of the facts and the previous opinion of this Court, that appellant Cipres had not intentionally relinquished a known right and privilege. Hence the only remaining issue in question was whether or not the officers made a search which was justifiable as incident to a lawful arrest or as incident to a substantially contemporaneous arrest. At the conclusion of the hearing the District Court made the following:

"SPECIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

I

"The above-entitled matter came on for hearing on May 18, 1965 on the basis of the opinion of the United States Court of Appeals for the Ninth Circuit, dated March 18, 1965, remanding the same for further proceedings before the Honorable Harry C. Westover, Judge, United States District Court;

the plaintiff appearing by John K. Van de Kamp, Assistant United States Attorney, Chief of the Criminal Division; defendant Ramona Cipres appearing and represented by counsel Harold J. Ackerman; defendant Juan Montes DeOca appearing and represented by counsel Wm. Bryan Osborne;

"The Court having considered the opinion of the Ninth Circuit Court of Appeals, the reporter's and clerk's transcript of the trial, and the records, file, and papers in the above matter, and having considered the testimony of the witness, Neil E. Greppin, at the hearing on May 18, 1965, together with the argument of counsel, the Court now makes its findings of fact.

"1. Since the latter part of 1962, Customs Agents in New York and Los Angeles investigated the shipment of marihuana from Los Angeles Airport to New York City." [May 18, 1965 Hearing, R. T. 7].

"2. As a result of the arrest of Frederick Penney in New York City in November of 1962, culminating an investigation relating to the shipment of marihuana from Los Angeles to New York, evidence was discovered by Customs Agents showing telephone calls in October 1962 and January 1963 from Penney's number to the number listed to Oscar De Oca (the defendant's brother) in Los Angeles." [May 18, 1965

Hearing, R. T. 8, 39].

"3. Subsequently, Customs Agents placed defendant De Oca and Oscar De Oca under surveillance." [May 18, 1965 Hearing, R. T. 9].

"4. In May of 1963, Customs Agents arrested a person by the name of Gomez coming across the Mexican border with 250 pounds of marihuana. Gomez stated to Customs Agents that his own vehicle had been left at the house of the person to whom the marihuana was going. Soon thereafter, Gomez' vehicle was located near the front of De Oca's home, was impounded thirty days later by Customs Agent Greppin and Sergeant Beckman of Los Angeles Police Department, and was found to contain a large quantity of marihuana debris." [May 18, 1965 Hearing, R. T. 10, 11].

"5. In September of 1963, the State Bureau of Narcotics relayed to Customs Agents information that they had received from a previously reliable informant, Roy Manzaneres, to the effect that defendant De Oca and Oscar De Oca were to receive a shipment of approximately 1000 pounds of marihuana from Mexicali. Customs Agents were also told that on one occasion Manzaneres had reported seeing defendant De Oca and brother Oscar De Oca receive 250 pounds of marihuana." [May 18, 1965 Hearing,

R. T. 10, 36].

"6. In September of 1963, Customs Agent Greppin received information from a confidential reliable informant that a Jorge Rodriguez, who had been arrested by Customs Agent Greppin and Sergeant Beckman of the Los Angeles Police Department in July of 1963, in possession of marihuana, was, with a man known as Guillermo Teodor to receive marihuana in Los Angeles to be brought across the border by Miguel Garcia and Cerena Truba." [May 18, 1965 Hearing, R. T. 11, 12].

"7. On September 17, 1963, Customs Agents discovered that Rodriguez was registered at the Blair House in Hollywood where he was associating with a man registered under the name of J. Martinez, but identified as Guillermo Teodor, who was known by Customs Agent Greppin to have previously been arrested with marihuana in his possession." [May 18, 1965 Hearing, R. T. 12].

"8. Through sound surveillance at the Blair House, Customs Agents determined that Martinez (nee Teodor) and Rodriguez were to receive a large quantity of marihuana that same day." [May 18, 1965 Hearing, R. T. 12].

"9. As a result of this information, Customs Agent Greppin and Sergeant Beckman placed with all

airlines at the Los Angeles International Airport a lookout for all persons registering under the name of Martinez on all New York flights." [May 18, 1965 Hearing, R. T. 12].

"10. Based on their investigation prior to the instant matter, Customs Agent Greppin and Sergeant Beckman had established the following modus operandi for marihuana traffickers going between Los Angeles and New York: 'Young Latin female couriers checked overweight baggage containing marihuana into the counters at American and Trans World Airlines immediately prior to flight time.' Additionally, the flights were invariably non-stop flights from Los Angeles to New York City." [May 18, 1965 Hearing, R. T. 6, 7].

"11. On the evening of September 17, 1963, Customs Agent Greppin and Sergeant Beckman received a radio call that a person had called in for reservations on the 10:00 p. m. flight to New York on American Airlines under the name of Martinez, and proceeded to the Los Angeles International Airport where they took up surveillance near the American Airlines ticket counter." [May 18, 1965 Hearing, R. T. 42, 43].

"12. At approximately 9:50 p. m., at the previously described position, Greppin saw the defendants DeOca and Cipres get out of a 1959 salmon

colored Pontiac, California license LMC 357, a car registered to Manuel Gonzalez. The officers watched as defendant DeOca removed two suitcases from the car [Exs. 1 and 2], and handed them to a porter stationed at curbside. DeOca was then observed to get back into the Pontiac and drive away from the terminal." [May 18, 1965 Hearing, R. T. 12, 13, 14] [R. T. 135, 138, 179(a)].

"13. Defendant Cipres followed the porter to the American Airlines ticket counter. The porter carried two large, lightweight-type bags known to Customs Agent Greppin as the same type of luggage involved in other marihuana trafficking cases." [May 18, 1965 Hearing, R. T. 15].

"14. Customs Agent Greppin and Sergeant Beckman heard defendant Cipres call for a reservation under the name of Martinez and observed the weight of the two bags when placed on the weighing machine, 140 pounds." [May 18, 1965 Hearing, R. T. 15, 16].

"15. Customs Agent Greppin and Sergeant Beckman then approached defendant Cipres, identified themselves as police officers and stated that they were conducting a narcotic investigation concerning her. When asked for identification, defendant Cipres admitted that her real name was Ramona Cipres,

but indicated that she sometimes used the name Martinez when travelling." [May 18, 1965 Hearing, R. T. 17, 18] [R. T. 142, 165].

"16. At approximately 9:55 p. m., Customs Agent Greppin noticed that one of defendant Cipres' bags was put on the moving conveyor belt which took the luggage down to the loading platform near the plane, and asked the luggage handler to retrieve the suitcase from the conveyor belt. The handler had to run to retrieve it. Meanwhile the second bag had been retrieved by Sergeant Beckman from the scale." [May 18, 1965 Hearing, R. T. 18, 19, 20].

"17. Following the removal of the bags from the conveyor belt and the scale, defendant Cipres was questioned further. Defendant Cipres, during this initial conversation, indicated that she had stayed at Monte Villa, and had just come from a friend's home in a cab in order to catch a plane for New York." [R. T. 166].

"When first asked about the contents of her suitcase she claimed she had clothes in them, but when queried as to how clothing could give so much weight to the suitcases, admitted, 'Well, I don't only have clothes in there, but I have cosmetics in there as well." [R. T. 166].

"Asked if they could search her suitcases,

defendant Cipres responded, 'Yes, I have nothing to hide.' When asked for the keys she added, 'The bags are locked and the keys are in New York.' " [R. T. 166, 145].

"18. At this point Greppin returned to the bag he had removed from the conveyor belt, picked it up, and by pushing the sides in and placing his nose to the seam of the suitcase, smelled an odor familiar to him, that of marihuana. He thereupon opened the suitcases, which were found to be already unlocked and discovered the marihuana contained therein." [R. T. 147, 162, 184].

"19. Agent Greppin walked over to Sergeant Beckman and defendant Cipres and advised defendant Cipres she was under arrest. The other bag was subsequently opened at the airport and found to contain marihuana. Both bags were unlocked." [R. T. 186, 162].

"20. The Court finds, inasmuch as there was no additional evidence presented by the plaintiff to the point, that defendant Cipres had not been warned of her constitutional immunity from unreasonable search and seizure, and, in light of all the facts, did not intentionally relinquish a known right and privilege.

"21. The Court further finds that the actions

of Customs Agent Greppin and Sergeant Beckman at the Los Angeles International Airport on the evening of September 17, 1963 in the period between 9:30 p. m. to 10:00 p. m. were at all times reasonable and prudent.

"22. The Court further finds from all the evidence in the case that at the time the bags were searched the officers had reasonably trustworthy information of facts sufficient to warrant a prudent man in believing that defendant Cipres was committing an offense and that the removal of the evidence was threatened.

"23. The search was valid as incident to a substantially contemporaneous arrest, for the officers had probable cause for the arrest at the time of the search, and the circumstances suggested that immediate search was necessary to preserve the material subject to seizure.

"24. Having reasonable cause to believe that there was marihuana in the two trunks in question which had been unlawfully introduced into the United States, the search was also justified by 19 U. S. C. A. Section 482.

II

"WHEREFORE, This Court Concludes:

"That the files and records of the case, the

Reporter's and Clerk's Transcript of Proceedings, the Reporter's Transcript of the hearing of May 18, 1965, conclusively show that the defendants are entitled to no relief; that the judgment herein was lawfully rendered, and that there has been no denial or infringement of their constitutional rights; that the evidence was properly admitted; that the evidence was not secured by conduct violating defendant Cipres' constitutional rights.

/s/ Harry C. Westover
UNITED STATES DISTRICT JUDGE

"APPROVED:

HAROLD J. ACKERMAN
Attorney for Defendant Cipres

WM. BRYAN OSBORNE
Attorney for Defendant DeOca"

IV

ARGUMENT

I THE SEARCH AND SEIZURE OF APPELLANT CIPRES' BAGGAGE AT THE LOS ANGELES INTERNATIONAL AIRPORT WAS VALID AS INCIDENT TO A SUBSTANTIALLY CONTEMPORANEOUS LAWFUL ARREST.

A. The Search and Seizure Were Contemporaneous to the Arrest.

To justify arrest of appellant Cipres, and the contemporaneous search and seizure of marihuana, the officers in charge must have been possessed of reasonably trustworthy information of facts sufficient to warrant a prudent man in believing that Cipres was committing or had committed an offense, and that the evidence was threatened by either imminent destruction or removal. Beck v. Ohio, 379 U.S. 89, 91 (1964).

The answer to the inquiry as to precisely when appellant Cipres was arrested, should not be entirely dispositive of the question whether the search and seizure was lawful as based upon probable cause. As was noted by this Court in its earlier remand of the case, "We have held that a prior search may be valid as incident to a substantially contemporaneous arrest without a warrant if the arresting officers had probable cause for the arrest at the time of the search, and the circumstances suggested that

immediate search was necessary to preserve material subject to seizure". Cipres v. United States, 343 F. 2d 95 (9th Cir. 1965).

Thus, the main question to answer should be: Did the officers have probable cause to arrest her prior to the seizure of the baggage? Before answering this question, let us first determine just when the arrest of appellant Cipres occurred. There is, at best, a general guideline which must be applied to each specific factual situation. In Henry v. United States, 361 U.S. 98, 103 (1959), it was held that: "When the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case, was complete." Applying this test to the facts here presented, it appears that appellant Cipres was restricted in the freedom to move as she pleased, no earlier than the point in time when Customs Agent Greppin and Sergeant Beckman took control of her baggage while she was waiting at the check-in counter. Certainly, prior to this time there was no semblance of what might be considered an arrest or limitation on her freedom. That being the case, the following questioning of appellant Cipres as to the contents and the subsequent opening of the bags were certainly incident to the substantially contemporaneous arrest.

Dickey v. United States, 332 F. 2d 773
(9th Cir. 1964).

B. The Contemporaneous Arrest and Search of Appellant Cipres' Baggage was Based upon Probable Cause.

The arrest and seizure by Agent Greppin and Sergeant Beckman were based on trustworthy and reliable information of specific details, which, when corroborated by the personal observations of the officers immediately prior to the arrest, were sufficient to warrant a prudent man in believing that appellant Cipres was committing an offense and that removal of the evidence was imminent.

Prior to the moment where Agent Greppin and Sergeant Beckman arrested appellant Cipres and seized her bags, they had probable cause to believe an offense was being committed. Agent Greppin and Sergeant Beckman were aware of a recurring pattern in incidents involving the illicit transportation of marihuana from Los Angeles to New York. Young female Latin couriers checked overweight baggage containing marihuana into the counters at American and Trans-World Airlines immediately prior to flight time. The flights were invariably non-stop. The officers also were aware of numerous other details of this pattern, as found by the District Court, supra. This pattern is substantially identical to that involved in Hernandez v. United States, No. 19654 (9th Cir. October 29, 1965).

In Hernandez, the police were aware of a recurring pattern whereby Latin-American couriers were buying non-stop tickets

to New York; their bags were overweight and there were no advance reservations made; the couriers invariably used the same type of baggage which was locked with combination locks. The officers in Hernandez arranged for the airport employees to notify them if anyone fitting the described pattern arrived at the airline terminal. In the instant case, Agent Greppin and Sergeant Beckman went to the airport to determine whether a passenger, with a reservation under the name of Martinez, fit the pattern above described. Here their prior inquiry was even more specific than that of the officers in the Hernandez case. Not only were they looking for someone who fit a particular pattern, but were looking for a person who would be flying to New York that very day, under the name of Martinez. Through reliable information, the Agents had learned that Rodriguez and a person using the name of Martinez were going to receive a large shipment of marihuana earlier during the same day. The agents through their investigation established that in fact one J. Martinez was Guillermo Teador whom they had previously arrested in possession of marihuana and whom they knew to be a courier of marihuana between Los Angeles and New York. Having determined that, the agents surmised that Teodor and Rodriguez would ship the marihuana to New York that evening and for that reason caused a lookout to be placed at Los Angeles International Airport for anyone registering under the name of J. Martinez.

At the time Agent Greppin and Sergeant Beckman saw appellant Cipres drive up to the terminal with appellant DeOca,

they were unaware that appellant Cipres was in fact the person who had a reservation for New York, under the name of Martinez. Certainly they were put on notice, however, when Agent Greppin recognized appellant DeOca as a person whom he had investigated previously for involvement in narcotics traffic. Appellant Cipres, especially under these circumstances, fit the known pattern precisely. Hernandez v. United States, supra.

There was present a composite set of facts which would have led any reasonably prudent man to suspect that a crime was being committed:

(a) That Guillermo Teador, utilizing the fictitious name Martinez, and known to the agents as being a courier of marihuana from Los Angeles to New York, and one Rodriguez, were receiving a shipment of marihuana that day;

(b) The officers seeing appellant Cipres drive up to the airport with a suspected narcotics violator, appellant DeOca, who assisted her in removing the bags from the car;

(c) Appellant Cipres calling for her ticket under the name of Martinez;

(d) The fact that the baggage which appellant Cipres carried was of the same type as had been used in previous narcotics trafficking cases; and

(e) The fact that every incident viewed by the officers at the airport fell into line with the known pattern utilized by previous marihuana couriers, i.e., overweight baggage, non-stop ticket to New York, female Latin courier, and arrival

immediately prior to flight time.

All of the foregoing facts were known to the officers prior to appellant Cipres' arrest.

As said in Hernandez, supra, at P. 4,

> "No one of the indicia drawn from prior incidents of illicit traffic was alone sufficient to justify a reasonable man in the belief that appellant's bags contained contraband, but taken together they rendered it probable."

All elements of the known pattern of incidents in narcotics trafficking were here present. Each of them was specific and narrowly descriptive. Actually, Agent Greppin and Sergeant Beckman acted here upon a higher quantum of probable cause than did the officers in Hernandez. Not only did appellant Cipres fit the suspected fact pattern but the officers were also acting upon the additional reliable information that a shipment of marihuana was to be received that day by a man known to be a courier of marihuana between Los Angeles and New York.

This is a case where the officers had prior and specific information which was corroborated by their on-the-spot observations. Draper v. United States, 358 U. S. 307 (1958).

The record shows that the officers saw, heard, and otherwise perceived facts sufficient to give them ground for belief that appellant Cipres had acted or was acting unlawfully. Beck v. Ohio, supra, at P. 94.

Appellants have complained that the officers arrested

appellant Cipres and seized her baggage without a warrant. No such warrant was required, the search being incident to a lawful arrest and for the further reason that there was probable cause to believe that contraband was present and threatened with immediate removal. Dickey v. United States, 332 F. 2d 773 (9th Cir. 1964); Fernandez v. United States, 321 F. 2d 283 (9th Cir. 1963); Hernandez v. United States, supra. The case at hand is precisely one where an arrest or search warrant would have been impossible to procure prior to removal of the contraband. The officers went to the airport at night with a knowledge of certain specific facts. These facts needed on-the-spot corroboration before a search warrant could have issued. At the very moment that the officers corroborated their prior specific information, they had to act or allow the baggage to be removed to New York.

II. THE DISTRICT COURT DID NOT ERR IN REFUSING TO FORCE THE GOVERNMENT TO DISCLOSE THE IDENTITY OF A CONFIDENTIAL INFORMANT.

Appellant Cipres complains that the Court erred in its refusal to order the Government to disclose the identity of a reliable confidential informer.

The informant in question was not an active participant in nor a percipient witness to the substantive crime. Indeed, the information which he provided to Agent Greppin was given in September 1963, and was to the effect that a Jorge Rodriguez,

who had been arrested by Agent Greppin in July of 1963 in possession of marihuana, was with a man known as Guillermo Teodor to receive marihuana in Los Angeles to be brought across the border by Miguel Garcia and Cerena Truba. This information was fully corroborated by surveillance at the Blair House on September 17, 1963 by Customs Agents (Special Findings of Fact and Conclusions of Law Nos. 6 and 7).

The general rule regarding whether the Government should be forced to disclose the identity of its informers is found in Roviaro v. United States, 353 U.S. 53, 62 (1957), which holds that a confidential informant need not be revealed and that his anonymity is to be retained unless there is a showing that he is connected with the commission of the offense, or disclosure of his identity would be otherwise essential to a fair determination of the cause.

It is clear that revealing the name of the informant who was neither a participant nor a witness to the crimes alleged would have been of no aid to the appellants, and could hardly be deemed essential to a fair determination of the cause.

In this light the Court was completely justified in refusing to require disclosure of the informant's identity. United States v. Rugendorf, 316 F. 2d 589 (7th Cir. 1963); Hurst v. United States, 344 F. 2d 327, 328 (9th Cir. 1965).

V

CONCLUSION

Inasmuch as the seizure of appellant Cipres' baggage at the Los Angeles International Airport was valid as incident to a substantially contemporaneous arrest, the information obtained as a result of that seizure was not tainted, and did not "poison" the evidence found at the garage of Manuel Gonzales, i.e., the marihuana which was the subject of Count Two.

For the reasons stated, the judgments of the District Court, as to both appellants, should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

/s/ John K. Van de Kamp

JOHN K. VAN DE KAMP

Received
Mar 22 1965
U. S. Attorney
Los Angeles, Calif.

APPENDIX "A"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RAMONA CIPRES and JUAN MONTES DeOCA, Appellants,	)	
vs.	)	No. 19,217
UNITED STATES OF AMERICA, Appellee.	)	

[Mar. 18, 1965]

Appeal from the United States District Court

for the Southern District of California

Central Division

Before: HAMLEY, KOELSCH, and BROWNING, Circuit Judges

BROWNING, Circuit Judge:

Ramona Cipres and Juan Montes DeOca appeal from convictions for trafficking in marihuana contrary to 21 U. S. C. A. §176(a).

I

Appellants argue that the district court erred in admitting into evidence two suitcases containing marihuana, contending that the evidence was secured by conduct violating Cipres' Fourth Amendment right to freedom from unreasonable search and seizure.

The marihuana was discovered and seized at the Los Angeles International Airport by a Customs agent and an officer of the Los Angeles Police Department. Their testimony relevant to the search and seizure was as follows: In September 1963, a man known to be engaged in narcotics traffic between Los Angeles and New York City checked in at a Los Angeles hotel under the assumed name of "Martinez." The airline companies were asked to advise the authorities of any reservations made in that name. On September 17, American Airlines informed the Customs Service that such a reservation had been made for an evening flight to New York City. The Customs agent and the police officer stationed themselves near American Airlines' check-in counter. Shortly before the scheduled departure time of the flight a car drove up to the adjacent curb and both appellants alighted. The Customs agent recognized DeOca as a person he had investigated earlier for possible involvement in narcotics traffic. DeOca took two suitcases from the car trunk, set them on the curb, returned to the car, and drove off. A porter took the bags to the check-in counter and set them on the scale. Cipres followed. The Customs agent observed that the bags weighed 140 pounds, and heard Cipres ask for a reservation in the name "Martinez". The officers identified themselves to Cipres, told her they were conducting a narcotics investigation, and wished to talk with her. In response to their questions, she told them her name was Cipres, but that she sometimes used the name Martinez in traveling. She said the bags contained clothing, but added, in explanation of their weight, that they also contained cosmetics.

The officers told Cipres they suspected the bags contained marihuana. She denied it. They asked if they could search the bags. She answered, "Yes, I have nothing to hide," but added that she had left the keys in New York City. They examined the bags and found them unlocked. The Customs agent opened the bags, discovered the marihuana, and arrested Cipres.

Cipres denied consenting to the search. She testified that the officers accosted her and asked about the contents of the bags. She asked if they had a search warrant, but they simply proceeded to open the bags. The officers admitted that Cipres asked if they had a search warrant, but only after the Customs agent had opened the bags with her permission and discovered the marihuana.

The district court treated the issue as simply whether or not Cipres told the officers they might search the suitcase. Seeing "no reason why I should disbelieve the testimony of the two officers," the court admitted the evidence.

But the issue the court was required to decide was much broader, and could not be resolved simply by weighing the credibility of Cipres against that of the officers. The issue was whether Cipres had waived her constitutional immunity from unreasonable search and seizure. Waiver, in this context, means the "intentional relinquishment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Such a waiver cannot be conclusively presumed from a verbal expression of assent. The court must determine from all the circumstances whether the verbal assent reflected an understanding, uncoerced,

and unequivocal election to grant the officers a license which the person knows may be freely and effectively withheld. [1] We recently sustained a district court finding that such waiver was lacking despite an express verbal consent, [2] and such cases are common. [3] They rest not only upon the nature of waiver itself, but also upon a recognition that the purpose of the exclusionary rule is not only to discourage overreaching by police officers, but also, and primarily, to protect the rights of the citizen. The crucial question is whether the citizen truly consented to the search, not whether it was reasonable for the officers to suppose that he did. [4]

Giving full credit to the officers' testimony that Cipres orally consented to the search, a substantial question still remained as to whether she waived her constitutional privilege. A number of circumstances suggest that her assent may have reflected less than a free,deliberate, and unequivocal decision to permit the officers to open the luggage: it was obtained "under color of the

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1 See generally, Comment, 113 U. Pa. L. Rev. 260 (1964).

2 Montana v. Tomich, 332 F.2d 987 (9th Cir. 1964), affirming Application of Tomich, 221 F. Supp. 500 (D. Mont. 1963).

3 See, e.g., United States v. Marrese, 336 F. 2d 501, 504 (3d Cir. 1964); Pekar v. United States, 315 F. 2d 319, 324-25 (5th Cir. 1963); Villano v. United States, 310 F. 2d 680, 684 (10th Cir. 1962); Channel v. United States, 285 F. 2d 217, 219 (9th Cir. 1960); Higgins v. United States, 209 F. 2d 819, 820 (D. C. Cir. 1954); Nelson v. United States, 208 F. 2d 505, 513 (D. C. Cir. 1953); Catalanotte v. United States, 208 F. 2d 264, 268 (6th Cir. 1953); Judd v. United States, 190 F.2d 649, 651 (D.C. Cir. 1951). See also Greenwell v. United States, 336 F. 2d 962, 967-68 (D. C. Cir. 1964).

4 Manwaring, 16 Stan. L. Rev. 318, 334-35 (1964).

badge" and therefore presumptively coerced; [5] it was coupled with the statement that the bags were locked and the keys unavailable, which on its face would have rendered the consent ineffectual; [6] it was accompanied by assertions that Cipres was innocent and that the suitcases contained innocuous articles and not marihuana, assertions certain to be exposed as false the moment the bags were opened; [7] and admittedly Cipres asked if the officers had a search warrant.

Because of the overly narrow view which the district court apparently took of the question presented, it did not explore and determine the issue of waiver in the light of these and other circumstances surrounding the arrest. We remand the case so that this may be done, either on the present record or after such further hearing as the court may deem appropriate. [8]

As we have noted, Cipres was arrested immediately following the discovery of the marihuana. The government urges that the arrest was valid, and that the search should be upheld as incident

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5 United States v. Page, 302 F. 2d 81, 84 (9th Cir. 1962).

6 Application of Tomich, supra, note 1, 221 F. Supp. at 503.

7 Channel v. United States, 285 F.2d 217, 221 (9th Cir. 1960); Higgins v. United States, 209 F. 2d 819, 820 (D. C. Cir. 1954); Judd v. United States, 190 F. 2d 649, 651 (D. C. Cir. 1951). See also United States v. Smith, 308 F. 2d 657, 663 (2d Cir. 1962). But see Martinez v. United States, 333 F. 2d 405, 407 (9th Cir. 1964), vacated and remanded ____ U. S. ____. (March 15, 1965).

8 See Martinez v. United States, ____ U. S. ____ (March 15, 1965); Rios v. United States, 364 U.S. 253, 260-62 (1960); Masiello v. United States, 304 F. 2d 399, 401 (D. C. Cir. 1962); United States v. Page, 302 F. 2d 81, 86 (9th Cir. 1962).

to it. We have held that a prior search may be valid as incident to a substantially contemporaneous arrest without a warrant if the arresting officers had probable cause for the arrest at the time of the search, and the circumstances suggested that immediate search was necessary to preserve material subject to seizure. [9] Thus the inquiry would be whether at the moment the bags were searched [10] the officers had reasonably trustworthy information of facts sufficient to warrant a prudent man in believing that Cipres

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9 Dickey v. United States, 332 F. 2d 773, 778 (9th Cir. 1964); Fernandez v. United States, 321 F. 2d 283, 286-87 (9th Cir. 1963); Busby v. United States, 296 F. 2d 328, 332 (9th Cir. 1961). See also United States v. Haley, 321 F. 2d 956, 958 (6th Cir. 1963). Compare Mosco v. United States, 301 F. 2d 180, 187-88 (9th Cir. 1962); Shadoan, Law and Tactics in Federal Criminal Cases 67 (1964); Collins, 50 Calif. L. Rev. 421, 441-42 (1962); Manwaring, 16 Stan. L. Rev. 318, 344-46 (1964); Orfield, 24 La. L. Rev. 665, 681-82 (1964). The Supreme Court has reserved the question. Ker v. California, 374 U.S. 23, 42-43 (1963). See also Stoner v. California, 376 U. S. 483 (1964).

It has been suggested that since the rule has been applied only where there were reasonable grounds to believe that imminent destruction or removal of material subject to seizure was threatened (prior to the searches in Busby and Haley the officers saw, and in Fernandez smelled, probable contraband in temporarily stopped automobiles; in Dickey, a probable possessor of narcotics was moving toward a bathroom), and hence is merely an application of the accepted principle that the Fourth Amendment does not preclude a search without a warrant in such "exigent circumstances." Manwaring, 16 Stan. L. Rev. 318, 344 (1964). See also Mosco v. United States, 301 F. 2d 180, 187-88 (9th Cir. 1962). The "exigent circumstances" exception to the general rule requiring a search warrant is independent of that permitting a warrantless search incident to a valid arrest (United States v. Ventresca, ___ U. S. ___ n. 2 (March 1, 1965); United States v. Jeffers, 342 U. S. 48, 51 (1951); Johnson v. United States, 333 U. S. 10, 14 (1948)), and if applicable it would be immaterial that the arrest followed the search, or that there was no arrest at all. The only relevant inquiry would be whether it was probable that contraband was both present and threatened with imminent removal or destruction.

10 Of course, nothing disclosed by the search could be considered to justify the arrest. United States v. Di Re, 332 U. S. 581, 595 (1948).

was committing an offense, [11] and that removal of the evidence was threatened. [12] But these also are questions of fact to be decided initially by the district court. That court has not yet done so; having found that Cipres "consented" to the search, the district court thought it unnecessary to determine whether the search might have been valid upon any other ground. Unresolved factual issues were likewise raised by the government's contention that the search was justified by 19 U. S. C. A. §482. [13] To avoid a further multiplication of hearings and appeals, these issues should be resolved by the district court on remand.

II

The appellants' remaining specifications of error are insubstantial.

1. It is true, of course, that proof of mere proximity to the drug would be insufficient to establish actual or constructive "possession" within the meaning of 21 U. S. C. A. § 176(a). [14] However, the testimony regarding Cipres' responses to the officers' inquiries as to contents of the bags, plus the natural inferences

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11 This accepted definition of probable cause for arrest was most recently restated by the Supreme Court in Beck v. Ohio, 379 U. S. 89, 91 (1964). The "reasonable grounds" to believe that an offense is being committed, authorizing a Customs agent to make an arrest without a warrant under 26 U. S. C. A. § 7607(2), is the equivalent of Fourth Amendment "probable cause." Wong Sun v. United States, 371 U. S. 471, 478 n. 6 (1963).

12 In addition to other facts recited earlier, it appeared that one of the bags had been placed on the airline conveyor belt.

13 See Romero v. United States, 318 F. 2d 530 (5th Cir. 1963).

14 Arellanes v. United States, 302 F.2d 603, 606 (9th Cir. 1962).

from the evidence as to the placement and movements of Cipres and the suitcases, afforded an adequate basis for the jury's determination that the luggage was in Cipres' immediate physical custody or subject to her dominion and control. Indeed, she testified to as much at the trial, offering an innocent explanation of a possession she did not deny.

2. No argument was offered in support of Cipres' specification of error asserting an insufficiency of proof of knowledge that the bags contained marihuana. Nonetheless, we have satisfied ourselves that the jury could properly infer guilty knowledge from evidence of record which, in the circumstances, we will not pause to detail.

3. Read in context, the trial court's comments upon the evidence, which Cipres suggests were inaccurate, were of minor importance. The court carefully instructed the jury that it was the sole judge of the facts and that the court's comments might be disregarded. No exception was taken at trial to the portions of the charge which Cipres now attacks. "We can find no plain error therein affecting the substantial rights of the appellants, nor can we find any error which would result in a manifest miscarriage of justice." Gilbert v. United States, 307 F. 2d 322, 327 (9th Cir. 1962).

4. We find no plain error in government counsel's closing argument.

5. Finally, appellant DeOca's argument that evidence concerning a second seizure of marihuana should have been suppressed as the product of the assertedly illegal prior seizure

discussed above cannot be sustained. There is nothing in the record to indicate that the two seizures were related. [15] Appellant DeOca made no suggestion in the trial court that they were. No request was made of the trial court that the evidence be suppressed or excluded as tainted by the earlier seizure, or for any other reason. [16]

Remanded for further proceedings in accordance with this opinion. [17]

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15 Gray v. United States, 311 F.2d 126 (D.C. Cir. 1962); Lowery v. United States, 258 F.2d 194, 196 (9th Cir. 1958).

16 Westover v. United States, ___ F.2d ___ (9th Cir. 1965); Gilbert v. United States, 307 F.2d 322, 325 (9th Cir. 1962); Billeci v. United States, 290 F.2d 628, 629 (9th Cir. 1961); compare Henry v. Mississippi, ___ U.S. ___ (1965).

17 Ogden v. United States, 323 F.2d 818, 822 (9th Cir. 1963).